

April 18, 2018

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Reply Comments in MB Docket No. 17-318

Dear Ms. Dortch:

CBS Corporation, the Walt Disney Company, 21st Century Fox, Inc., and NBCUniversal Media, LLC (collectively, the “Network Commenters”) file this reply in opposition to the proposal submitted jointly by the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the “Affiliates Associations”), which urged the Commission to adopt a two-tiered structure for the television national ownership cap. This two-tiered cap would substantially benefit non-network owned station groups while seriously disadvantaging stations owned by network organizations and their viewers.¹

As we explain below, the Affiliates Associations’ proposal is unsupported by marketplace realities, divorced from rational policy, and legally infirm. Indeed, the proposal is so flawed that it arguably warrants no response at all. In the interest of a complete record, however, and for the purpose of preserving our legal standing, the Network Commenters are filing this brief reply to underscore that the Affiliates Associations’ proposal cannot be reconciled with the facts or the law.

In their comments, the Affiliates Associations ask the Commission to *tighten* the current permitted national audience reach of the Network Commenters (via elimination of the UHF discount), while *expanding* the permitted national audience reach of all other station owners. Put simply, however, especially in an environment that the Affiliates Associations acknowledge to be “fast-changing” for all broadcast stations, there can be no justification for adopting a national broadcast television ownership rule that varies depending on the identity of a station’s owner.² We therefore have no doubt that the Commission will reject outright the proposal for a two-tiered ownership cap, as a matter of both law and policy.

¹ See Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, MB Docket No. 17-318 (filed Mar. 19, 2018) (“Affiliates Associations Comments”).

² *Id.* at 2. Certainly, the Notice of Proposed Rulemaking to which the Affiliates Associations purport to respond provides no reason to suspect that the Commission would expressly discriminate against one group of station owners in its ownership policy.

The Affiliates Associations’ comments proffer a variety of unpersuasive justifications for the two-tiered national ownership cap. At the most basic level, they explain that local broadcasters “compete for viewers and advertisers with increasing numbers of new outlets for video programming.”³ We agree. Yet the challenges described by the Affiliates Associations, such as “accelerating competition for . . . viewers’ attention” and advertising revenues, are not unique to the Affiliates Associations’ members; nor are they a reason for adopting rules that uniquely burden network-owned stations.⁴

As network-owned stations are subject to the same competitive dynamics and to the challenges and opportunities they pose, these stations and their viewers will comparatively suffer to the extent they are treated less favorably. The Commission should not adopt policies that will negatively impact certain viewers based on the ownership of the broadcast stations they can receive. And the Commission should resist calls to use marketplace competition as an excuse for asymmetric regulation or regulatory arbitrage.

The Affiliates Associations also seek to portray network-owned stations as qualitatively inferior to non-network owned stations, which is demonstrably false. Network-owned stations have a tradition of leadership and excellence in localism at least as long and distinguished as the many stations that have non-network ownership. Stations in both categories, regardless of ownership, produce and distribute important local news, local public affairs, and other locally originated programming for the communities they serve. For instance, during major weather emergencies in recent years—such as the wildfires in Los Angeles, hurricanes and flooding in New York, and hurricanes in Miami, to name just a few—network-owned stations (and non-network owned stations) preempted regularly-scheduled network programming, provided wall-to-wall coverage of the emergencies, and delivered the life-saving information their viewers depend on. Indeed, all members of the Commission have recognized the role that broadcast stations serve as first informers during such emergencies.⁵ It therefore is not surprising that

³ *Id.* at 7.

⁴ *Id.* at 2.

⁵ *Remarks of FCC Chairman Ajit Pai at the National Association of Broadcasters Show*, Apr. 10, 2018, https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0410/DOC-350163A1.pdf (“If there has been a dominant theme of the past year for broadcasters, I would say it’s been your role as first informers.”); *see also*, e.g., *Remarks of FCC Commissioner Michael O’Rielly Before the National Association of Broadcasters*, Apr. 9, 2018, https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0410/DOC-350134A1.pdf (“During times of emergencies, it is the local broadcaster that always answers the call.”); *Prepared Remarks of FCC Commissioner Mignon L. Clyburn*, Jan. 25, 2017, https://apps.fcc.gov/edocs_public/attachmatch/DOC-343198A1.pdf (“For decades, this [broadcast] industry has been the cornerstone of local communities, providing news, weather and emergency information.”); *Remarks of Commissioner Jessica Rosenworcel; Federal Communications Commission; Eye of the Storm: Broadcasters’ Role in Emergencies*, Jan. 18, 2018, https://apps.fcc.gov/edocs_public/attachmatch/DOC-348767A1.pdf (“From the earliest days of the iconic beeps of the Emergency Broadcast System, broadcasters have been an essential part of our public safety response.”); *Remarks of FCC Commissioner Brendan Carr at the 2018 National Association of Broadcasters Show*, Apr. 10, 2018, https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0410/DOC-350162A1.pdf (recognizing

while the Network Commenters in the aggregate own fewer than 10 percent of local television stations, they win nearly 20 percent of certain local news awards, as measured by the Affiliates Associations themselves.⁶

Accordingly, adoption of a two-tiered ownership cap would constitute bad public policy. Equally important, the Affiliates Associations' two-tiered proposal would be unlawful. While we need not exhaustively discuss here all of the legal infirmities of the proposal, at a minimum, the Affiliates Associations' proposal would be inherently arbitrary and capricious under the Administrative Procedure Act ("APA"). The APA requires treating similarly situated parties similarly; it also mandates that there be a "rational connection between the facts found and the choice made."⁷ The Affiliates Associations' proposal falls far short of these standards. The proposal also unconstitutionally burdens the speech of some, but not all, similarly situated speakers.⁸

For all of these reasons, there is no basis for the Commission to find in 2018 that it could promote localism by *tightening* the national ownership reach of some station owners while *expanding* the reach of far more others, particularly given the highly competitive state of the media marketplace. Broadcast television stations can and do serve local interests no matter the identity of their owners, and all stations operate in the same highly competitive media marketplace. The Commission therefore should reject the Affiliate Associations' unsupported, unsound, and unlawful proposal to adopt a two-tiered national ownership cap.

broadcasters' "vital service to local communities" and "the essential ways that broadcasters serve their communities").

⁶ See Affiliates Associations Comments at 17.

⁷ *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); see also, e.g., *Etelson v. Office of Pers. Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982) ("Government is at its most arbitrary when it treats similarly situated people differently."); *Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dep't of Health & Human Servs.*, 300 F. Supp. 2d 32, 42 (D.D.C. 2004) ("[I]f an agency treats similarly situated parties differently, its action is arbitrary and capricious in violation of the APA.") (internal citation omitted).

⁸ See, e.g., *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 813 (D.C. Cir. 1988) (finding that legislation precluding use of funds to extend time period of then-existing grants of temporary ownership waivers violated First and Fifth Amendment guarantees).

Respectfully submitted,

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